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Supreme Court, U.S.

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In the
Supreme Court of the United States

October Term, 1991

No. 91-

JOSEPH CUSUMANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the court below correctly held that the phrase, "such fund," in 18 U.S.C. § 1954, should be expansively read to include not only "such fund" as to which Petitioner/Defendant possessed the relevant relationship (outside consultant to the Dental Benefit Plan/Fund of the Retail Clerks Tri-State Health and Welfare Fund) but also to include any other "fund" concurrently operated by the Retail Clerks Tri-State Health and Welfare Fund (in this instance, the Life Insurance Benefit Plan/Fund as to which Petitioner possessed no relationship) so as to sustain the conviction of Petitioner thereunder?

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CITATIONS OF OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is unreported as yet, but is appended hereto as Appendix "A", and is captioned *United States v. Joseph Cusumano*, No. 90-1931, slip op. (3d Cir. Aug. 28, 1991). The Opinion of the United States District Court for the Eastern District of Pennsylvania is unreported, but is appended hereto as Appendix "B", and is captioned *United States v. Joseph Cusumano*, (E.D. Pa. Cr. No. 90-91-01, 1990).

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear the instant Petition for Writ of Certiorari from the judgment of the United States Court of Appeals for the Third Circuit, entered on August 28, 1991, pursuant to 28 U.S.C. § 1254.

STATUTE IN QUESTION

§ 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan

Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than \$10,000 or imprisoned not more than three years, or both: *Provided*, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee wel-

fare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974. (U.S.C.A. 18.)

**In the
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UNITED STATES OF AMERICA,

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this criminal prosecution pursuant to 18 U.S.C. § 3231 (1980). The United States Court of Appeals for the Third Circuit had jurisdiction over the appeal from the judgment of conviction pursuant to 28 U.S.C. § 1291 (1988).

A. Procedural Facts

This Petition relates to a judgment and sentence of conviction entered by The United States District Court for the Eastern District of Pennsylvania (Gawthrop, J.) after an eight-day jury trial (R. 196-201.)¹

The Bill of Indictment, handed down by the Grand Jury

1. All citations, except for a few citations to the original notes of testimony, are to the original Appendix, filed in the court below.

on February 22, 1990, charged Petitioner in forty-nine (49) Counts as follows: one count of conspiracy pursuant to 18 U.S.C. § 371; three counts of embezzlement from an employee benefit plan pursuant to 18 U.S.C. § 664; thirty-six (36) counts of kickbacks relating to an employee benefit plan under 18 U.S.C. § 1954; seven counts of laundering the proceeds of an unlawful activity pursuant to 18 U.S.C. § 1956; two counts of foreign travel in aid of a racketeering enterprise pursuant to 18 U.S.C. § 1952. In addition, Petitioner Cusumano was charged in all of the counts, save and except the conspiracy count (Count I) and the Travel Act counts (Counts 40 and 42), with aiding and abetting pursuant to 18 U.S.C. § 2 (R. 6-27).²

Following jury selection on July 16, 1990, trial continued for eight days. On July 25, 1990, the jury returned a verdict of guilty on all counts. Defendant filed a timely motion for judgment of acquittal on July 26, 1990 (R. 3) which motion was denied by the District Court on December 4, 1990. (See Appendix "B" hereto.)

On December 5, 1990, the District Court sentenced Mr. Cusumano to three years of concurrent imprisonment on each of the thirty (30) § 1954 Counts which antedate the effective date of the Sentencing Guidelines, plus six years of imprisonment (to run concurrently with each other and, in part, concurrently with the thirty (30) three-year concurrent terms) on each of the two embezzlement Counts which antedate the Guidelines, plus a concurrent seventy-one (71) month term of imprisonment on the remaining Counts, all of which were post-Guideline offenses. In addition, these periods of confinement were ordered to be followed by three years of supervised release. The sentencing Court also ordered res-

2. A co-defendant, one John Bogan, was also named in the Indictment. Before trial, however, Defendant Bogan entered into a plea bargain with the prosecution and became a witness against Defendant/Petitioner Cusumano. *United States v. Bogan*, E.D. Pa. Cr. No. 91-02, June 21, 1990.

titution in the amount of \$447,518.07, plus special assessments totalling \$2,450 and a fine of \$1.00 (R. 196-201).

Defendant filed his Notice of Appeal to the Third Circuit Court of Appeals on that same date—December 5, 1990.³ On August 28, 1991, the court below entered its judgment of affirmance and filed the Opinion of the unanimous court in support thereof. (See Appendix “A” hereto.) Hence, this matter is ripe for consideration by this Court, pursuant to the present Petition for Writ of Certiorari.

B. The Indictment

The text of 18 U.S.C. § 1954, so far as is germane to this prosecution, is as follows:

Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of *any employee welfare benefit plan or employee pension benefit plan*; or

* * *

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to *such plan*

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning *such plan* . . . shall be fined not more than \$10,000 or imprisoned not more than three years . . .⁴. (Emphasis supplied.)

3. Although the sentencing court's formal Judgment Order dated December 5, 1990 was not filed by the Clerk in that court until December 7, 1990, pursuant to *United States v. Hashagen*, 816 F.2d 899 (3d Cir. 1987) (*en banc*), the Court of Appeals had jurisdiction over the appeal.

4. Neither the Indictment nor the evidence in the trial court suggested that Mr. Cusumano was a person who fit within subsections (2) or (3) of 18

The charging paragraphs of the § 1954 Counts specifically alleged that Messrs. Cusumano [Petitioner here] and Bogan:

... did knowingly and unlawfully solicit and receive, and did aid and abet the receipt of, a fee, kickback, commission, gift, money and thing of value, that is, currency and securities, in the amounts set forth below, with a total value of approximately \$181,614, from an insurance agent known to the grand jury because of and with intent to be influenced, in respect to their actions, decisions and other duties relating to questions and matters concerning *the Fund* (sic), that is, the placement of insurance coverage for *the Fund* with an insurance agent ... (R. 15.) (Emphasis supplied.)

Counts 2 through 36 of the Indictment (the § 1954 Counts) also incorporated by reference the following relevant paragraphs from Count 1 of the Indictment (the conspiracy Count) (R. 6-8):

1. At all times material to this Indictment, the United Food and Commercial Workers Union Locals 27, 1357, 1358, 1360 and Acme Market, A & P, and various independent food stores which were engaged in, and the activities of which affected interstate commerce, established and maintained a *health and welfare fund* (hereinafter "*the Fund*"), which was an employee benefit plan subject to the provisions of Title I of the Employee Retirement Income Security Act of 1974, as amended, Title 29,

U.S.C. § 1954. The entire thrust of the prosecution related to sections (1) and (4) and, of course, to the contention that Mr. Cusumano was an aider or abettor under either of those sections. Likewise, it was not argued in the trial court—or submitted to the jury on the theory—that Mr. Cusumano should be convicted pursuant to the disjunctive clause following the quotation of the text above; that is, that he was a "... person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section ...".

United States Code, Sections 1001 *et seq.* On or about March 1, 1988, Local 1357 withdrew from *the Fund*.

* * *

5. From on or about September 1, 1972, to on or about August 31, 1987, *Health Corporation of America* (hereinafter "HCA") and its subsidiaries *North American Dental Plans Inc.* (hereinafter "North American") and *Cytex Corporation* (hereinafter "Cytex") provided and administered dental plans for the benefit of the Fund. HCA, North American and Cytex maintained a principal place of business at 1160 West Swedesford Road, Berwyn, Pennsylvania.

6. At all times material to this Indictment, defendant JOSEPH CUSUMANO was president of HCA, North American and Cytex.

7. At all times material to this Indictment defendant JOHN BOGAN was employed and acted as administrator of *the Fund*.

8. At all times material to this Indictment, an independent insurance agent known to the Grand Jury (hereinafter "the insurance agent") was engaged in the business of obtaining insurance coverage for entities and individuals. (Emphasis supplied.)

The Indictment went on to make clear, however, that the "insurance coverage for the Fund" referred to in the § 1954 counts (see p. 4, *supra*) was not the "dental plans for the benefit of the Fund" with which Mr. Cusumano and his company were identified as set forth in paragraph 5 of Count 1 of the Indictment as quoted above. Rather, the "insurance coverage" which was the predicate of the § 1954 convictions was, as is set forth in the Overt Acts allegations of Count 1 of the Indictment, *group life insurance coverage; not the dental plan*. See, for example, the following text of the Indictment (R. 11-12):

1. In or about February, 1982, defendant JOSEPH CUSUMANO met and advised the insurance agent that

the agent could become the insurance agent *for the group life insurance coverage for the Fund* if the insurance agent would kickback to CUSUMANO fifty percent of the commissions received.⁵

* * *

3. In or about early 1982, defendant JOHN BOGAN provided the insurance agent with specifications for the purpose of submitting a proposal for placement of [life] insurance coverage to *the Fund*.

4. In or about early 1982, defendant JOHN BOGAN and the insurance agent met and agreed that the agent would solicit from insurance companies their proposals and costs for providing [life] insurance coverage to *the Fund*.⁶

5. In or about April, 1982, the insurance agent obtained from [Northwestern National Life Insurance Company] NWNL a proposal for [life] insurance coverage for *the Fund* (hereinafter "the April, 1982, NWNL proposal") which included a twenty percent commission rate for the [life] insurance agent.⁷

5. See, also, ¶¶11 and 12 of the conspiracy Count (R. 9):

11. It was a part of the conspiracy that defendant JOSEPH CUSUMANO would and did solicit the payment of kickbacks from the [life] insurance agent to influence the placement of [life] insurance coverage for the Fund.

12. It was a further part of the conspiracy that defendant JOSEPH CUSUMANO would and did receive kickbacks from the [life] insurance agent and would and did divide the kickbacks with persons known and unknown to the grand jury.

6. See, also, ¶9 of the conspiracy Count (R. 8):

9. At all times material to this Indictment, Northwestern National Life Insurance Company (hereinafter "NWNL") was a corporation, with offices located at 20 Washington Avenue South, Minneapolis, Minnesota, engaged in the business of providing coverage for various risks of loss and casualty to its policyholders.

7. See, also, 14 of the conspiracy Count (R. 9-10):

14. It was a further part of the conspiracy that the [life] insurance agent would and did obtain [life] insurance coverage for the Fund which paid a commission rate of twenty percent to the [life] insurance

* * *

7. On or about May 20, 1982, defendant JOHN BOGAN met with defendant JOSEPH CUSUMANO and the insurance agent to advise them that the April, 1982, NWNL proposal had been accepted by the Board of Trustees.

8. On a monthly basis from September, 1982, through May, 1987, the [life] insurance agent received twenty percent commissions from NWNL for the premiums paid by *the Fund*.⁸

* * *

10. On a monthly basis from September, 1982, through May, 1987, the [life] insurance agent paid to defendant JOSEPH CUSUMANO approximately fifty percent of the commissions received by the [life] insurance agent from NWNL.⁹ (Emphasis supplied.)

C. The Evidence

At trial, the Government's evidence, consistently with the Indictment, established to the satisfaction of the jury that the "insurance agent" identified in the Indictment—a cooperating witness named Dudley Dennison Fincke—along with cooperating former co-defendant Bogan¹⁰—had established

agent. The commission rate would result in the payment of approximately \$100,000.00 per year to the [life] insurance agent. The cost of the commission was passed from the [life] insurance company to the Fund as additional premium.

8. See, also, ¶14 of the conspiracy Count, n. 7, *supra*.

9. See, also, ¶11 of the conspiracy Count (R. 9-10):

11. It was a part of the conspiracy that defendant JOSEPH CUSUMANO would and did solicit the payment of kickbacks from the insurance agent to influence the placement of insurance coverage for the Fund.

10. See, also, ¶¶7, 12 and 19 of the Indictment (R. 8-10):

7. At all times material to this Indictment defendant JOHN BOGAN was employed and acted as administrator of the Fund.

* * *

the group life insurance plan as alleged, that commissions in the amount of twenty percent of premium were paid to Fincke by the insurance carrier (Northwestern National Life Insurance Company), that insurance agent Fincke was giving approximately one-half of the insurance commissions to Mr. Cusumano, and that Mr. Cusumano, in turn, was remitting significant portions of these split commissions to Mr. Bogan.

The evidence also established, however, that neither Mr. Cusumano individually nor the corporation of which he was President—and which had the separate involvement with the Retail Clerks Tri-State Health and Welfare Fund with respect to the separate dental benefit plan—had any role in soliciting the life insurance coverage, had any role in submitting the life insurance proposals to the plan trustees for their approval, or had any role in submitting statutorily required reports on the life insurance plan to the federal government. Indeed, the uncontroverted evidence in the court below establishes that cooperating witness insurance agent Fincke and cooperating witness co-defendant Bogan were the ones who, over the entire period involved in this Indictment, prepared all statistical data and other information necessary to submit proposals to the insurance carrier, prepared and submitted comparative cost analyses and other information to the trustees so as to obtain approval for the NWNL life insurance plan, and prepared false reporting information for the federal authorities with respect to the plan including, specifically, false information as to commissions being paid by the life insurance carrier.¹¹ (R.11-14)

12. It was a further part of the conspiracy that defendant JOSEPH CUSUMANO would and did receive kickbacks from the [life] insurance agent and would and did divide the kickbacks with persons known and unknown to the grand jury.

. . .

19. It was a further part of the conspiracy that defendant JOSEPH CUSUMANO would and did divide the kickbacks he received with defendant JOHN BOGAN and with persons known and unknown to the grand jury.

11. This evidence proved the allegations of the Indictment as follows:

3. In or about early 1982, defendant JOHN BOGAN provided the

In short, the evidence established, at most, that Petitioner had introduced life insurance agent Fincke to union representative Bogan so that Fincke and Bogan could, with the exercise of their separate authority and knowledge, plan, effectuate and consummate the scheme with respect to life insurance coverage.

Indeed, it is fair to say that when the Government sought, by way of innuendo, to establish that Petitioner had a more active role in the life insurance scheme than the mere introduction of Messrs. Fincke and Bogan, the Government's endeavor failed. That is, the government sought to suggest that Petitioner had a more active role in the life insurance scheme than a mere introduction of the other players by permitting Messrs. Fincke and Bogan to hint, suggest and

[life] insurance agent with specifications for the purpose of submitting a proposal for placement of [life] insurance coverage to the Fund.

4. In or about early 1982, defendant JOHN BOGAN and the [life] insurance agent met and agreed that the agent would solicit from [life] insurance companies their proposals and costs for providing [life] insurance coverage to the Fund.

5. In or about April, 1982, the [life] insurance agent obtained from NWNL a proposal for [life] insurance coverage for the Fund (hereinafter "the April, 1982, NWNL proposal") which included a twenty percent commission rate for the [life] insurance agent.

6. On or about May 20, 1982, defendant JOHN BOGAN submitted the April, 1982, NWNL proposal received from the [life] insurance agent, to the Board of Trustees of the Fund and concealed the twenty percent commission.

* * *

11. During the years 1983 through 1987, the [life] insurance agent prepared false IRS Forms 5500 and mailed them to defendant JOHN BOGAN who submitted them to the IRS and to the Fund.

12. On or about December 21, 1983, defendant JOHN BOGAN prepared and placed correspondence into the business records of the Fund to conceal the amount of commissions received by the [life] insurance agent.

* * *

23. On or about December 5, 1988, defendant JOHN BOGAN and the [life] insurance agent discussed the preparation of a false IRS Form 5500 to conceal the actual amount of commissions received.

infer that Petitioner had some power to control the votes of two of the union trustees concerning acceptance *vel non* of the life insurance plan. Those two trustees appeared as witnesses at the trial, however, and expressly denied the innuendos that had been advanced by the cooperating witnesses, which denials went effectively unchallenged by the government (N.T. July 23, 1990, pp. 2-17). Hence, the sole evidence before the jury with respect to Petitioner's involvement in the life insurance plan is that already mentioned: namely, an initial introduction of life insurance agent, cooperating witness Fincke, and fund general administrator, turned co-defendant Bogan, followed by receipt of monies from Fincke which he shared with Bogan.

D. The Charge of the Court

With respect to the § 1954 charges, the trial court instructed the jury as follows (R. 107-111):

I will instruct you with respect to the elements which Government [sic] must prove beyond a reasonable doubt. In order to establish the violation charged in Counts Two through 36 of this indictment, three elements must be proved beyond a reasonable doubt in order to establish the offense charged in this indictment.

* * *

Second, it must be proved that Joseph Cusumano was an officer, counsel, agent or employee of an organization which provides services to an employee welfare benefit plan.

* * *

The second element of the offense is that the defendant, Joseph Cusumano, was a Trustee or agent of the employee benefit plan or that he was an officer, counsel, agent or employee of an organization which provides services to any employee benefit plan.

* * *

The third element is that the Government must prove

beyond a reasonable doubt that the defendant asked for, received, or agreed to receive, or gave offered or promised, a fee, kickback, commission, gift, loan or other thing of value.

* * *

It is sufficient if you determine that the defendant received the thing of value because of his actions, decision or other duties relating to questions and matters concerning the plan, or that he received the thing of value with the intent to be influenced with respect to such actions, decisions or other duties.

The phrase "because of" in the indictment refers to graft. And the phrase "with the intent to be influenced" refers to bribery. *You need not conclude that the defendant committed both bribery and graft in order to convict him. You may elect as to which way the crime was committed, if indeed, you find the crime to have been committed, beyond a reasonable doubt.*

* * *

It is sufficient if you find that the defendant occupied any of the positions I have described to you and received the thing of value:

One, because of that status which gave him at least ostensible power to exercise influence over planned (sic) matters; or two, with the purpose of exercising influence, he actually or ostensibly had over decisions regarding the plan. (R. 107-111) (Emphasis supplied.)

At this juncture in the charge of the court there was an interruption due to the illness of a juror¹² so that, after a brief

12. It was during this interruption, and prior to the court's completion of its charge to the jury as set forth in the text above, that counsel for Petitioner reiterated his objection to the construction of § 1954 being offered to the jury by the court. The colloquy between counsel with respect to that objection, and the court's interpretation of the law, is as follows (R. 112-113):

MR. RUTTER: Your Honor asked during the recess whether there were any objections to the charge so far. I said to you there are two. Let

delay, the court continued its charge on the § 1954 offense as follows (R. 117-119):

... Ladies and gentlemen, I was talking to you about the definition of kickback. I will pick it up from there. In that regard, ladies and gentlemen, it is not necessary that you find from the proof that the defendant, Joseph Cusumano, was the one who had the authority to and did actually make the final decision on the approval of *the plan matter*.¹³

It is sufficient if you determine that he was in a

me take them in reverse order, since the one I am about to address first goes to the one you're now charging the jury on.

By essentially tracking the language of the Government's request for charge number 16, 19 and 21 in your description so far of the elements of the offense under section 1954, you have been led into describing Mr. Cusumano as being the recipient of kickbacks in his capacity as an officer, counsel, agent or employee of an organization which falls within the definition of employee welfare benefit plan.

I think that is error. I think if Mr. Cusumano is to be convicted, again having in [mind] my argument in connection with the Rule 29 motion yesterday it would have to be he was the person who offered or promised or gave rather than his being the recipient of.

THE COURT: Do you agree?

MR. [AUSA] SCHENCK: I think he is both. Number one, we would agree that it would be appropriate with regard to that Statute to mention Mr. Bogan's position with the Union and whether Mr. Cusumano aided and abetted. I don't know if that is part of the Court's charge, aiding and abetting makes him guilty of the substantive offense, the payments to Mr. Bogan. But *it was also our position that as the president of HCA was that which gave him the entry into the Union.*

MR. [AUSA] GOLDMAN: *The jury can conclude because of his position with the Union in administering the dental plan he had the power to influence the Trustees.*

MR. RUTTER: That as I mentioned yesterday in connection with the Rule 29 [Motion] and I reiterate, I think it is an improper broadening of 1952 [sic] particularly under the Third Circuit decision of *Palmeri* [630 F.2d 192]. (R. 112-113)

13. It is uncontroverted—and incontrovertible—that Petitioner Cusumano had *no relevant relationship whatsoever* with the life insurance plan.

position to give evaluation, advice and recommendation which though not controlling in the final sense, would have some influence on the final decision or decisions.

It is not necessary that Joseph Cusumano have held an official position with *the plan* or exercised the final authority over the operations of *the plan*. *It is sufficient if you conclude that the defendant, Joseph Cusumano, occupied a position described in the Statute [sic] and either exercised control, direct or indirect, authorized or unauthorized over the plan or that he had actual or ostensible power to exercise influence over the affairs of the plan.*

* * *

The final element which the Government must establish beyond a reasonable doubt [sic], is that the defendant acted because of or with the intent to be influenced by the sum of money or thing of value that he asked for or received.

What this means is that *while carrying out his duties with respect to the plan the defendant acted with the motive or expectation of financial gain or other benefit to himself or others. . . . (Emphasis supplied.) (R. 117-119.)*

The court below correctly delineated Petitioner's contention with respect to the reach of § 1954 in that court, when it said:

Cusumano challenges the government's use of the Fund as the relevant plan in this case. He contends that in referring to a welfare benefit plan and to "such plan," § 1954 refers to the specific plan that is the subject of the kickback scheme. Further, he argues that in this case it was the life insurance plan alone that was the subject of the kickback scheme. Thus it is his position that the government was required to prove Cusumano's relationship to the life insurance plan.

* * *

Once it is established that the plan in question is an ERISA plan, the government must prove two elements

under § 1954. First, it had to establish that Cusumano was “an administrator, officer, trustee, . . . agent, or employee of” *the plan* or “a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to *such plan*.” Next, the government had to prove that Cusumano received a kickback “because of or with intent to be influenced with respect to, any of his actions . . . relating to any question or matter concerning *such plan*.” Cusumano raises no challenge to the sufficiency of the government’s proof as to either element if the *Fund* is the relevant plan. Rather, he contends that such proof is irrelevant because his relationship to the *life insurance* plan is the requisite focus, since it was *the plan* that was the subject of the kickback scheme. (Emphasis in original.)

However, the Third Circuit reframed the question of the meaning of “such fund” by saying:

We agree with Cusumano that the language “such plan” refers to the same plan to which the defendant bears the relevant relationship. Further, because the wrongful transaction must involve “such plan,” we also agree that the plan to which the defendant bears the relationship must be the plan that is the subject of the kickback scheme. The question, then, is whether the Fund was a subject of the kickback scheme. If it was, the Fund was properly the subject of the § 1954 counts.¹⁴

And, with that reframed question, the court below affirmed Petitioner’s conviction by reading “such fund” to mean not each discrete plan/fund under the Retail Clerks Tri-State umbrella, but the Tri-State Fund as a whole, saying:

The evidence demonstrates that the Fund was established for the purpose of providing various types of benefits through the purchase of individual insurance contracts. The Board, on the Fund’s behalf, accepted Fincke’s

14. *I.e.*, “the Fund” becomes “such plan.”

proposed bid to purchase life insurance coverage from an insurance company. That bid was the product of the scheme orchestrated by Cusumano. The money the Fund used to pay for the life insurance coverage went in part to Cusumano under the scheme. Therefore, we cannot say, as a matter of law or fact, that the Fund was not the subject of the kickback scheme. We therefore reject Cusumano's contention.

ARGUMENT

A. Petitioner Cusumano Is Entitled To A Judgment Of Acquittal On The Section 1954 Charges Pursuant To The Plain Meaning Of The Statutory Language.

There can be no argument contrary to the proposition that a statute—or, at least, a federal statute—is to be read and construed according to the plain meaning of the language used therein. Indeed, if the statutory language is plain and clear, a court's inquiry should go no further than that language in order to arrive at an understanding and interpretation of the statute. Here, the court below agreed with Petitioner's reading of the statute; that is, that the words "such plan" in 18 U.S.C. § 1954(c) must mean the same, identical plan as that to which a defendant bears a relationship made relevant by the statute.¹⁵

However, and notwithstanding the concurrence by the court below with Defendant/Petitioner's plain meaning reading of the statute, that court went on to say—as had the prosecution and the trial court—that the statutory term "such

15. The Court stated:

We agree with Cusumano that the language "such plan" refers to the same plan to which the defendant bears the relevant relationship. Further, because the wrongful transaction must involve "such plan," we also agree that the plan to which the defendant bears the relationship must be the plan that is the subject of the kickback scheme.

plan" meant something other than, different from, and broader than, those plain, pellucid words. That is, the court expanded the meaning of "such plan" (i.e., the dental benefit plan of the Fund) to the Retail Clerks Tri-State Health and Welfare Fund, *qua* Fund.

As appears from the foregoing recital, it is apparent that the entire Indictment, trial and conviction in this case revolved around activities concerning a life insurance plan for union members who are the beneficiaries of the several discrete and distinct benefit plans provided under the overall aegis of the Retail Clerks Tri-State Health and Welfare Fund.

It is also plain from the foregoing recital—and the position taken by the Government at trial, as well as the Opinion of the court below—that, while Petitioner and his corporation were active participants in the provision of dental benefits to such union members, neither Mr. Cusumano nor his company had any activity whatsoever with respect to the provision of life insurance benefits. Hence, Petitioner could not be found to have violated § 1954 since it specifically, and exclusively, proscribes activities relating to "such plan", i.e., the dental plan in this case.

That is, the statute plainly says, "[w]hoever being (1) an administrator, officer, trustee, custodian, counsel, agent, or employee of *any employee welfare benefit plan or employee pension benefit plan*, or . . . (4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to *such plan* receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions or other duties relating to any question or matter concerning *such plan* . . ." has committed a criminal offense.

Indeed, paragraphs (2), (3) and (4) of § 1954 make perfectly plain, by the use of the phrase "*SUCH PLAN*"—just as such phrase is used in the succeeding clause of the statute—that *the statute focuses on activity relating to a specific defined*

plan and is not intended to reach out generically to other activities engaged in by the statutorily defined persons which relate to some activity other than the specifically defined plan in question.

In other words, for Petitioner to be convicted under § 1954, it would have to be established either that he held one of the statutorily defined positions *with respect to the life insurance plan* or that he either personally or through his corporation provided services to *the life insurance plan*. There is no evidence of either; that is, he neither held such position with respect to the NWNL life insurance plan, nor did he or his corporation provide any service to the NWNL/Retail Clerks life insurance plan. *Petitioner's connection with the concurrently operating dental plan is not sufficient to implicate "such plan" as defined by § 1954 in this case, i.e., the life insurance plan.*¹⁶

The court below has previously had occasion to construe § 1954 on three occasions, in each instance paying lip service to the words "such plan" but, in each instance, also giving increasing breadth to the scope of 1954.

First, in *United States v. Palmeri*, 630 F.2d 192 (3d Cir. 1980), the court was confronted with the argument that certain individuals were not subject to § 1954 prosecution because they were merely business agents of the Teamsters Union and did not hold positions exercising authority to disburse money from the union funds. The court rejected the argument saying (630 F.2d at 199-200):

The more reasonable construction of the statute is one that includes within the regulated class all persons

16. This understanding of § 1954 is compelled not only by elementary principles of English grammar but is also compelled by the rule of lenity. That is, the law is settled that even civil penal statutes are to be construed strictly and that one "is not to be subjected to a penalty unless the words of the statute plainly impose it." *C.I.R. v. Acker*, 361 U.S. 87, 91 (1959) (Emphasis supplied.) A *fortiori* is this the rule as to criminal penalties. See *infra*, pp. 22-24

who exercise control, direct or indirect, authorized or unauthorized, over *the fund*. This accords with the broad purpose of the anti-racketeering statute, 18 U.S.C. § 1962, for which § 1954 serves as a predicate offense. (Emphasis supplied)

In further explicating its understanding of § 1954, however, the *Palmeri* court underlined the requirement that the criminal activities be related to "the fund" (and not some extraneous activity). That is, in finding support for its ruling in the Second Circuit's decision in *United States v. Russo*, 442 F.2d 498 (2d Cir. 1971), *cert. denied*, 404 U.S. 1023 (1972), the court noted (630 F.2d at 200):

... *Russo* was a situation much like this one, in which the appellants had no formal relationship *with the plans* but exercised sufficient influence over them to come within the proscription of § 1954. (Emphasis supplied.)

And in the footnote wherein the court identified the key elements of a § 1954 violation, the court said (630 F.2d at 199, n. 3):

... To establish a violation of § 1954, the government must prove that the defendant served in one of the positions specified in the first part of the statute, and that he solicited or received certain benefits with intent to be influenced in his dealings with *the employee benefit plan*. (Emphasis supplied.)

In short, the words "such plan" (used four times in the same paragraph of § 1954) means "the plan" as to which improper influence is involved, not some other "Fund" or extraneous activity.

Thereafter, in *United States v. Friedland*, 660 F.2d 919 (3d Cir. 1981), the court below dealt with the argument that certain attorneys who were counsel to a Teamsters pension fund could not be held to have violated § 1954 when they received kickbacks from a certain borrower of pension fund money, it being the attorneys' contention that § 1954 could be

violated only if the implicated individual had the capacity directly to influence the employee plan. The court rejected that contention and the appellant attorneys' reliance on *Palmeri*, saying (660 F.2d at 925-926):

Appellants contend that the trial court erred in failing to instruct the jury that it must find that appellants had some capacity to influence the granting of the loan. . . . They contend that *Palmeri* requires a finding that appellants had a demonstrated capacity to control or influence the issuance of loans. In so doing, appellants read too much into the *Palmeri* decision. . . . *Palmeri* clearly stands for the proposition that capacity to influence *indirectly* is sufficient to support conviction under § 1954. The jury in the instant case found that appellants were counsel to *the Fund*. Appellants' status as counsel to *the Fund* is sufficient to place them in the class of those persons capable of violating either prong of § 1954 simply by soliciting or accepting payment (a) by virtue of their status as counsel, under the "because of" prong, or (b) with an improper purpose, under the "intent" prong. (Emphasis supplied and explication added.)

That is, although capacity to influence indirectly *the plan* is as amenable to § 1954 prosecution as is capacity directly to influence the activities of *the plan*, it must be "the plan" ("such plan" in the language of the statute), and not some extraneous activity, in order to implicate § 1954 liability.

Finally, in *United States v. Soures*, 736 F.2d 87 (1984), the court addressed the question whether § 1954 criminal liability could arise out of an improperly influenced decision by a union president to impose—and then either enforce or not enforce—a lien for unpaid welfare benefit funds. The court affirmed the conclusion that § 1954 is applicable to such activity. In doing so, however, the court emphasized the necessity to find—and its finding—of a sufficient connection between the decisions influenced by the payoff and "the plan" (*i.e.*, "such plan" in the language of the statute), 736 F.2d at

90. The full text of the opinion which is germane to the analysis of the instant matter is as follows (736 F.2d at 89-90):

Soures appears to be arguing that the statute applies only when there has been actual misuse of funds in an employee benefit plan. It is true that cases prosecuted under this section have generally involved payment to a union official or fund advisor in return for investment of union benefit funds.

* * *

However, the statutory language is broad and is not by its terms limited to decisions regarding investment of union funds. Although no reported case has involved payment to union officials in return for decisions made by them in connection with the collection of money due *the benefit plan* or the protection of the fund's ability to collect such money, such decisions fall within the literal language of the statute. It covers receipt of any "money" (the rent money) by a union officer (Soures) with "intent to be influenced with respect to, any of his actions, decisions . . ." (the decision to subordinate the lien) relating to "any question or matter governing *such plan*" (appellant Soures concedes "the subordinated lien related, in part, to money owed to *the Union's employee benefit plans*." Brief of Appellant at 15 n. 4).

* * *

In each instance in which a question has arisen as to the interpretation and construction of § 1954, the courts have given the broad language of the statute full effect. . . .

* * *

. . . Defendant was accused of accepting money to pay his rent with the intention of being influenced not to reimpose the lien that protected the Union's ability to collect its benefit funds. . . . Therefore, there is a sufficient connection between the decisions influenced by the payoff and *the plan*. (Emphasis supplied.)

In short, this somewhat complex statute—18 U.S.C. § 1954—describes four discrete classes of persons as to whom certain conduct is proscribed. The first class of such persons, described in subsection (1) of the statute, includes administrators, employees and the like of an employee benefit plan. While co-defendant Bogan was clearly such an administrator of the employee benefit plan (the life insurance benefit plan), there was no evidence that Petitioner Cusumano was an administrator, agent or other person connected *with the life insurance plan*. Nor was there any evidence that either Petitioner or his corporation provided any service (whether within the meaning of subsection (4) of § 1954 or otherwise) *to the life insurance plan*.

Rather, the undisputed evidence was that Petitioner Cusumano was an officer and employee of a corporation (Health Corporation of America) which rendered services to *the dental plan* provided by the Retail Clerks but *not the employee benefit plan—the life insurance plan—in issue*. These facts were totally undisputed.

Hence, the court charged the jury that it could find defendant Cusumano guilty when the evidence, viewed in the light most favorable to the prosecution, supported no theory of culpability encompassed by the statute and the Indictment. Hence, as urged at the close of the evidence pursuant to Rule 29 of the Federal Rules of Criminal Procedure, and as urged upon exception to the court's charge, Petitioner Cusumano was entitled to a directed judgment of acquittal on those counts predicated upon 18 U.S.C. § 1954, Counts 2 through 36 of the Indictment, inclusive.

And the court below, by affirming the conviction on the rationale that the statutory phrase "*such plan*" does not mean such plan (i.e., the dental benefits plan) but, rather, means each and all of the multitudinous and disparate activities in which the Fund *qua* Fund engages has placed an impermissi-

ble expansive judicial gloss on the plain meaning of "such plan."

Therefore, as to these counts, and for this reason, Petitioner is entitled to (a) a grant of this Petition and (b) a Writ of Certiorari from this Court directing a reversal by the court below of those convictions with a direction by this Court that a judgment of acquittal be entered on those Counts.

B. In Any Event, And Further, The Rule Of Lenity Requires A Reading Of The Statutory Language—"Such Plan"—As To Require A Reversal Of The Judgment Of The Court Below.

Commencing not later than Mr. Justice Frankfurter's Opinion for this Court in a Mann Act case, *Bell v. United States*, 349 U.S. 81 (1955), and continuing in this Court through, at least, Mr. Justice Blackmun's Opinion for the Court in *Dowling v. United States*, 473 U.S. 207 (1985) it has been the "time-honored interpretative guideline" that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Dowling v. United States*, 473 U.S. at 229, quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985), quoting, in turn, *Rewis v. United States*, 401 U.S. 808, 812 (1971).¹⁷

That is, as Mr. Justice Frankfurter said, 349 U.S. at 83-84:

About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single crimi-

17. See also, e.g., *U.S. v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952); *Ladner v. U.S.*, 358 U.S. 169 (1958); *Huddleston v. U.S.*, 415 U.S. 814 (1974); *Adamo Wrecking Co. v. U.S.*, 434 U.S. 275 (1978); *Bifulco v. U.S.*, 447 U.S. 381 (1980); *Tanner v. U.S.*, 483 U.S. 107 (1987); *McNavy v. U.S.*, 483 U.S. 350 (1987); *U.S. v. Kuzminski*, 487 U.S. 931 (1988); and *Hughey v. U.S.*, — U.S. —, 75 S.Ct. 620 (1990).

nal unit. *When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.* And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a *presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.* This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against . . .” turning one category of prohibited conduct and relationship into an entirely different category of prohibited relational conduct. (Emphasis supplied.)

Or, as articulated by Mr. Justice Blackmun in *Dowling*, *supra* at 228, quoting from *U. S. v. Lacher*, 134 U.S. 624, 628 (1890), the language of [Section 1954] does not “plainly and unmistakably cover Petitioner’s conduct . . .”¹⁸

In short, the use of the phrase “such plan” repeatedly throughout the pertinent language of the text of the statute under which these charges were brought and Petitioner Cusumano was convicted (18 U.S.C. § 1954), must either have the plain meaning recognized even by the court below¹⁹ or, failing such plain meaning, is ambiguous and must, therefore, be resolved in favor of lenity towards this Petitioner.

18. See, also, Mr. Justice Marshall’s succinct statement of the rule for a unanimous Court in *Rewis v. U.S.*, 401 U.S. 808 at 812 (1971), where he said:

. . . ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity . . .

19. See p. 14, *supra*.

The United States cannot have it both ways: it cannot, as it persuaded the lower courts, contend that the statutory phrase "such plan" plainly means the same identical plan as that to which the accused has the defined right or relationship and yet, at the same time, expand the phrase "such plan" to mean something more than the very plan—in this case, the dental benefits plan—to an all-encompassing "plan" which implicates every activity engaged in by the organization (here, the Tri-State Fund) of which the "plan" is a discrete part.

Either Petitioner Cusumano was entitled to a judgment of acquittal as a matter of law because of the plain meaning of "such plan" or, alternatively, the Congressional use of the words "such plan" in the statute is of such inherent ambiguity that Petitioner Cusumano was entitled to a judgment of acquittal pursuant to the teachings of the rule of lenity.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court issue its Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit so as to hear and decide this case and grant Petitioner a directed judgment of acquittal on all counts on which he stands convicted under 18 U.S.C. § 1954.

Respectfully submitted,

By _____
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APPENDIX

Filed August 28, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-1931

UNITED STATES OF AMERICA

v.

JOSEPH CUSUMANO

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania

D.C. Crim. No. 90-00091-01

Argued May 14, 1991
BEFORE: HUTCHINSON, COWEN and
SEITZ, *Circuit Judges*.

Filed: August 28, 1991

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

Joseph Cusumano appeals his conviction and sentence pursuant to his involvement in a kickback scheme concerning an employee benefit plan. The district court had jurisdiction under 18 U.S.C. § 3231 (1988). This court has jurisdiction under 28 U.S.C. § 1291 (1988).

I. FACTS

Viewing the evidence in the light most favorable to the government, the facts relevant to this appeal are as follows. Certain union locals and retail food stores maintained the Retail Clerks Tri-State Health and Welfare Fund ("Fund") which administered various benefit programs for approximately 14,000 retail food workers. The Fund was managed by a board of trustees ("Board") that met regularly to discuss matters related to the Fund. John Bogan was the Fund's

administrator, acting under the direction of the Board.

The Board contracted with various companies to provide benefit services to the Fund for the Fund's beneficiaries. One of these companies was Health Corporation of America (HCA), which provided and administered dental benefit coverage. Cusumano was president of HCA. In that capacity he appeared before the Board at its regular meetings.

In the early 1980's the Board instructed Bogan to solicit bids for life insurance benefit coverage to be provided by the Fund. Although he was not an official of the Fund, at some point not disclosed by the record, Cusumano learned of the Board's plan to purchase life insurance coverage. Thereafter Cusumano approached insurance agent Dennison Fincke to discuss Fincke's becoming the agent for the life insurance plan. Cusumano explained that he himself was not allowed to be the broker for life insurance coverage because he was already a vendor for the dental plan. Cusumano told Fincke that he and Fincke would "split the commission 50-50." When Fincke advised Cusumano that he had obtained a bid from an insurance company that would yield a fifteen percent commission, Cusumano instructed Fincke to obtain a bid providing a twenty percent commission. Cusumano and Fincke discussed how Fincke would set up and use a dummy offshore corporation to avoid paying taxes on the commissions.

Cusumano also met with Bogan to solicit his agreement to entertain Fincke's bid, telling him that "he would be taken care of" if the Board accepted Fincke's bid. Bogan recommended Fincke's bid to the Board, which approved it.

Fincke's bid contained a misrepresentation of the amount of the commission, proposing an annual \$12,000 commission when in actuality he would receive almost \$100,000 annually.

From 1982 to 1988 Fincke received monthly commission checks of approximately \$8000 as agent for the life insurance plan. Fincke deposited the checks as he and Cusumano had agreed and paid Cusumano his one-half share in cash. Cusumano paid Bogan \$400 a month. In 1986 Fincke set up a bank account in the Cayman Islands for the commission payments, and Cusumano traveled to the Cayman Islands twice to collect his share from Fincke. Thereafter, Fincke sent Cusumano the payments by check, which Cusumano then deposited into his father's or secretary's bank account.

On February 22, 1990, Cusumano was charged in a 49-count indictment as follows: one count of conspiracy under 18 U.S.C. § 371; four counts of embezzlement from an employee benefit plan under 18 U.S.C. § 664; thirty-five counts of receipt of kickbacks relating to an employee benefit plan under 18 U.S.C. § 1954; seven counts of laundering the proceeds of an unlawful activity under 18 U.S.C. § 1956; and two counts of foreign travel in aid of a racketeering enterprise under 18 U.S.C. § 1952. All counts save the conspiracy and money laundering counts also charged Cusumano with aiding and abetting under 18 U.S.C. § 2. Bogan was also charged in the indictment but later entered into a plea agreement. Both Bogan and Fincke appeared as government witnesses in Cusumano's trial.

On July 25, 1990, the jury returned a verdict of guilty on all counts. The district court imposed

multiple three and six year prison terms for Cusumano's pre-Guidelines conduct and multiple Guidelines terms of 71 months, all to run concurrently. Significant fines and restitution were also imposed under the Guidelines. Final judgment of conviction and sentence was entered December 7, 1990, and Cusumano appealed to this court.

II. DISCUSSION

Cusumano seeks acquittal on all counts except the embezzlement counts, as to which he seeks a new trial. He also challenges certain aspects of his prison sentence under the Sentencing Guidelines. Cusumano's primary argument for acquittal concerns his convictions under § 1954, and we turn first to that provision.

A. Section 1954

Cusumano contends that he is entitled to acquittal on the thirty-five counts directly related to the kickback scheme under 18 U.S.C. § 1954 (1988). That section subjects the following persons to criminal liability:

Whoever being:

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan . . .¹¹ or

. . . .

1. The section defines "welfare benefit plan" by reference to Title I of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1168 (1988) ("ERISA")

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan²

This court has characterized this provision broadly to reach "all persons who exercise control, direct or indirect, authorized or unauthorized, over the fund." *United States v. Palmeri*, 630 F.2d 192, 199-200 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981) (cited in *United States v. Soures*, 736 F.2d 87, 90 (3d Cir. 1984); *United States v. Friedland*, 660 F.2d 919, 925, 927 (3d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982)).

The § 1954 counts of the indictment charged that Cusumano

. . . did knowingly and unlawfully solicit and receive . . . a fee, kickback , commission, gift, money and thing of value, that is, currency and securities . . . from an insurance agent . . . because of and with intent to be influenced, in respect to [his] actions, decisions and other duties relating to questions and matters concerning the Fund, that is, the placement of

2. The indictment makes clear that only the quoted portion of § 1954 is potentially applicable to Cusumano in this case. Thus other portions of the section are omitted.

insurance coverage for the Fund with an insurance agent

Cusumano raises two legal challenge to his § 1954 convictions. First, he asserts that the Fund was not an ERISA welfare benefit plan. Second, he contends that the Fund cannot be the subject of his § 1954 prosecution because the scheme involved only the life insurance plan.

1. Was the Fund an ERISA Plan?

As noted above, the government's theory in this case was that Cusumano held the necessary position of influence with respect to the Fund. Cusumano contends that § 1954 does not encompass such a theory because the Fund is not a "welfare benefit plan" within the meaning of ERISA. Consequently, Cusumano argues that the government failed to prove the first element of a § 1954 prosecution, i.e., that the plan in question was a welfare benefit plan under ERISA.

Initially, we note that the question whether the Fund was a welfare benefit plan under ERISA was submitted to the jury without objection from Cusumano. In fact Cusumano delayed until oral argument in this court before raising this issue. Therefore, our power to grant relief is limited to circumstances in which the district court's instruction to the jury was plain error affecting substantial rights. See Fed. R. Crim. P. 30, 52(b). Given that the challenge to the construction of the statute goes to the existence *vel non* of criminal responsibility, we think that the error, if such it was, would affect Cusumano's due process rights and would constitute plain error. *United States v. Piccolo*, 835 F.2d 517, 519 (3d Cir. 1987), cert.

denied, 486 U.S. 1032 (1988). We therefore turn to the merits of Cusumano's contention.

Title I of ERISA defines a "welfare benefit plan" or "welfare plan," in relevant part, as

any plan, fund, or program . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing . . . (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1).³

Cusumano contends that the Fund is not a welfare benefit plan because it provides more than one of the listed types of benefits. Thus, he construes narrowly the quoted disjunctive language to exclude from ERISA coverage any plan that provides more than one type of benefit. He supports his position by arguing that each individual benefit plan under the Fund, including the dental and life insurance plans, requires a

3. Section 186(c), a provision of the Labor Management Relations Act, refers to, *inter alia*, pooled vacation, holiday and severance benefits. 29 U.S.C. § 186(c)(6) (1988). The effect of § 1002(1)(B) "is to include in the definition of 'welfare plan' those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized)". 29 C.F.R. § 2510.3-1(a)(3) (1990).

separate application and approval by federal agencies such as the Department of Labor and the Internal Revenue Service.

According to the language of ERISA, 29 U.S.C. § 1002(1), the Fund is a welfare benefit plan "to the extent" it was established or maintained for the purpose of providing any of the listed benefits. See *Donovan v. Dillingham*, 688 F.2d 1367, 1371 n.5 (11th Cir. 1982) (in dicta, "plan . . . furnishing both benefits listed in . . . § 1002(1) and benefits not listed . . . is subject to ERISA to the extent the plan . . . has as its purpose the providing of the enumerated benefits"). The Fund provided, in addition to other benefit plans, dental and life insurance plans for the benefit of the employees it served. Both of these fall within the benefits enumerated in § 1002(1), which Cusumano does not dispute. Therefore, to the extent that it provided both dental and life insurance benefits, the Fund was a "welfare benefit plan." To read the statute in any other way would be contrary to the plain meaning of its language. It follows from this conclusion that the fact that separate applications may have to be filed with different government agencies, and their separate approvals obtained, does not alter our analysis. Thus we reject Cusumano's construction. Given our conclusion, it is not suggested that the ultimate question was not for the jury. Therefore, the district court did not err in submitting the § 1954 counts to the jury.

2. Can the Fund be the Subject of Cusumano's § 1954 Prosecution?

Cusumano challenges the government's use of the Fund as the relevant plan in this case. He contends that in referring to a welfare benefit plan and to "such plan," § 1954 refers to the specific plan that is the subject of the kickback scheme. Further, he argues that in this case it was the life insurance plan alone that was the subject of the kickback scheme. Thus it is his position that the government was required to prove Cusumano's relationship to the life insurance plan.⁴

Cusumano invokes our plenary standard of review on this challenge. It is not entirely clear whether the government invokes the plenary or substantial evidence standard of review. We shall assume, without deciding, that the plenary standard governs our review.

Once it is established that the plan in question is an ERISA plan, the government must prove two elements under § 1954. First, it had to establish that Cusumano was "an administrator, officer, trustee, . . . agent, or employee of" *the plan* or "a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to *such plan*." Next, the government had to prove that Cusumano received

4. If Cusumano can be read to be arguing that the indictment charged that he received kickbacks "because of or with intent to be influenced with respect to, any of his actions . . . relating to" the life insurance plan, we think the simple answer is that the indictment charged instead that he received kickbacks relating to the Fund.

a kickback "because of or with intent to be influenced with respect to, any of his actions . . . relating to any question or matter concerning *such plan*." Cusumano raises no challenge to the sufficiency of the government's proof as to either element if the *Fund* is the relevant plan. Rather, he contends that such proof is irrelevant because his relationship to the *life insurance plan* is the requisite focus, since it was that plan that was the subject of the kickback scheme.

We agree with Cusumano that the language "such plan" refers to the same plan to which the defendant bears the relevant relationship. Further, because the wrongful transaction must involve "such plan," we also agree that the plan to which the defendant bears the relationship must be the plan that is the subject of the kickback scheme. The question, then, is whether the *Fund* was a subject of the kickback scheme. If it was, the *Fund* was properly the subject of the § 1954 counts.

We understand Cusumano to be arguing that because the kickback scheme involved the premiums paid by the *Fund* for life insurance coverage, the relevant plan for § 1954 purposes was the life insurance plan. However, the issue is not whether the life insurance plan could be the subject of a § 1954 prosecution, but whether the *Fund* could be. While he does not state his argument in this way, the necessary implication of Cusumano's position is that the *Fund* was not involved in the kickback scheme. However, Cusumano does not explain why it is that the *Fund* was not defrauded, nor would such an argument be convincing on the facts of this case.

The evidence demonstrates that the *Fund* was established for the purpose of providing various

types of benefits through the purchase of individual insurance contracts. The Board, on the Fund's behalf, accepted Fincke's proposed bid to purchase life insurance coverage from an insurance company. That bid was the product of the scheme orchestrated by Cusumano. The money the Fund used to pay for the life insurance coverage went in part to Cusumano under the scheme. Therefore, we cannot say, as a matter of law or fact, that the Fund was not the subject of the kickback scheme. We therefore reject Cusumano's contention.

In consequence, we reject Cusumano's challenges to his § 1954 convictions. We need not address the government's alternative theory that he was properly convicted as an aider and abetter. Nor need we address Cusumano's arguments for acquittal on the conspiracy, money laundering and travel counts, because they concededly are predicated upon a reversal of his § 1954 convictions.

B. Embezzlement Counts

Cusumano seeks a new trial on the counts charging him with embezzlement under 18 U.S.C. § 664. That provision imposes criminal liability on

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any [ERISA] employee welfare benefit plan . . . or of any fund connected therewith

The indictment charged that Cusumano

did embezzle, steal and unlawfully and willfully convert to [his] own use . . . the moneys, funds, securities, premiums, credits, property and other assets of the Fund

Cusumano assigns two grounds of error in the district court's charge to the jury. It is suggested at the outset by both parties that we should review these objections only for plain error. The record is not entirely clear as to whether the objections were preserved. However, because of our conclusion, we will proceed to address the merits under the abuse of discretion standard as if the objections had been preserved. *See United States v. Santos*, 932 F.2d 244, 247 (3d Cir. 1991); *United States v. Beros*, 833 F.2d 455, 458 n.3 (3d Cir. 1987).

Cusumano first argues that the district court improperly charged the jury in the disjunctive rather than conjunctive. He asserts that, although § 664 is written in the disjunctive, the indictment charged in the conjunctive, and thus the district court, in instructing the jury in the disjunctive, permitted the jury to go beyond the indictment.

Where the relevant statute lists alternative means of violation, "[t]he general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any of the acts charged." *Turner v. United States*, 396 U.S. 398, 420 (1970). This rule obviously extends to a trial court's jury instructions in the disjunctive in the context of a conjunctively worded indictment. *See United States v. Klein*, 850 F.2d 404, 405-06 (8th Cir.), *cert. denied*, 488 U.S. 867 (1988); *United States v. Schiff*, 801 F.2d 108, 114 (2d Cir. 1986), *cert.*

denied, 480 U.S. 945 (1987); *United States v. Uzzolino*, 651 F.2d 207, 210 n.2 (3d Cir.), *cert. denied*, 454 U.S. 865 (1981). Cusumano does not argue that the evidence was insufficient with respect to any of the acts charged. Therefore, the failure to charge in the conjunctive cannot be treated as an improper amendment of the indictment. We thus conclude that the district court's charge did not constitute an abuse of discretion.

Next, Cusumano argues that the district court should have given a specific unanimity instruction on the embezzlement counts under *United States v. Beros*, 833 F.2d 455 (3d Cir. 1987). He states that the district court gave merely a general unanimity instruction, but failed to specify to the jury that it must be unanimous in concluding that Cusumano committed one of the disjunctive acts. Thus he argues that the jury might have thought that it could convict as long as each of them believed he committed one of the listed offenses but without being unanimous as to any offense. His proposed point for charge illustrates his grievance. Cusumano proposed that, after charging as to the disjunctive list of offenses, the district court instruct the jury that "you are instructed that . . . the jury must unanimously agree on one or more of these charged elements."

The *Beros* rule comes into play only when the circumstances are such that the jury is likely to be confused as to whether it is required to be unanimous on an essential element. As we stated in *Beros*, the need for a specific unanimity instruction is the exception to the "routine case" in which a "general unanimity instruction will ensure that the jury is unanimous on the factual

basis for a conviction, even where an indictment alleges numerous factual bases for criminal liability." 833 F.2d at 460.

In *Beros* the government charged the defendant under a disjunctively worded statute, alleging that the defendant violated that statute by engaging in three separate and different acts. This court held that it was an abuse of discretion not to specifically instruct the jury that it had to be unanimous as to at least one of the three acts committed. *Id.* at 460-63. Here, the government did not allege different sets of facts, and the only possible confusion arose from the disjunctive nature of the charge under the statute. There is insufficient risk of confusion in such circumstances and the need for a specific unanimity instruction was not triggered. See *United States v. Jackson*, 879 F.2d 85, 89 (3d Cir. 1989). Therefore, the district court's charge did not constitute an abuse of discretion and a new trial is not warranted.⁵

C. Sentencing Challenges

Cusumano presents three challenges to his sentence. Although his notice of appeal stated that he was appealing from "the final judgment of sentence," Cusumano's brief makes clear that his sentencing challenges pertain only to the prison sentence imposed under the Guidelines, and our

5. We note that Cusumano cites *United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977), in the context of his argument under *Beros*. *Dansker* is inapplicable here for a variety of reasons, not the least of which is that this court has not reversed Cusumano's conviction on any count.

review is thus confined to those issues.⁶ He challenges the base offense level assigned, an upward adjustment for "aggravating role," and an upward adjustment for obstructing justice. His arguments present both factual and legal challenges, and our standard of review is determined accordingly.

1. Base Offense Level

Cusumano first contends that the district court improperly relied on the money laundering counts to determine his base offense level. Guidelines § 3D1.1 directs a district court, in the case of convictions on multiple counts, to group the counts into "Groups of Closely-Related Counts" under § 3D1.2, and then to determine the offense level applicable to each group under § 3D1.3. Under § 3D1.2(b), counts are grouped together when they "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting a part of a common scheme or plan." Under § 3D1.3(a), the district court is instructed to assign the offense level "for the most serious of the counts comprising the Group, *i.e.*, the highest offense level of the counts in the Group."

6. The offenses which were the basis of the Guidelines sentences occurred prior to the effective date of the current Guidelines, November 1, 1990. Both the parties and the district court refer to the current Guidelines without mention of this fact. Because our disposition is unaffected by amendments to the Guidelines in effect at the time of the offenses, we also will apply the current version.

The district court, rejecting Cusumano's argument that the money laundering offenses were "ancillary" to the primary kickback offenses, concluded that "the money laundering . . . is very much in the thick of this entire scheme." On that basis the court grouped the money laundering offenses with the other offenses for the purposes of determining the offense level. The district court assigned a base offense level of 23 under Guidelines § 2S1.1(a) relating to money laundering.⁷

Cusumano contends that the district court erred in relying on the money laundering counts to determine the base offense level. He argues that the money laundering counts were not related, but were ancillary, to the other counts in the indictment. This contention requires us to determine whether the counts were properly grouped under § 3D1.2(b).

We have previously stated that a construction of § 3D1.2 is a legal issue for our plenary review. See *United States v. Riviere*, 924 F.2d 1289, 1304 (3d Cir. 1991). However, in that case the issue was "whether offenses for which society is the victim are properly grouped together" In contrast, Cusumano's particular objection requires us to decide whether his various offenses were part of one overall scheme, which we view as an "essentially factual" issue. On that basis, our review of the district court's determination that the offenses were not "ancillary" is governed by the

7. Cusumano contends that the district court should have assigned a base offense level under Guidelines § 2E5.1(a)(2) relating to violations concerning employee welfare plans.

clearly erroneous standard. See *United States v. Ortiz*, 878 F.2d 125, 126-27 (3d Cir. 1989).

Cusumano contends that the evidence showed that Fincke made all the arrangements concerning the handling of the money, and that Cusumano played a minimal role in the conduct that was the basis for the money laundering counts. Thus he contends that the money laundering offenses were ancillary to the "real" charged offense, the kickbacks.

Even if we were to accept his dubious characterization of the facts, Cusumano's argument does not defeat the application of § 3D1.2(b) to this case. Cusumano was convicted under the money laundering statute, 18 U.S.C. § 1952. The issue here under the Guidelines is whether those convictions and his other convictions "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting a part of a common scheme or plan." The victim of all offenses in this case was the Fund and its beneficiaries. The evidence demonstrated that the unlawful kickbacks, the embezzlement, the conspiracy, the travel act violations and the money laundering were all part of one overall scheme to obtain money from the Fund and to convert it to the use of Cusumano, Fincke and Bogan. Therefore, the district court's conclusion that the money laundering offenses were not "ancillary" is not clearly erroneous.

While less than clear, Cusumano also seems to contend that, even if the district court properly applied the language of § 3D1.2(b) to group the counts together, that result is inconsistent with the overall intent of the Guidelines which is to

sentence on the bases of a "real offense" system rather than a "charge offense" system. He argues that the "real" or "core" offenses of which he was convicted were those involving the kickback scheme, and he should thus be sentenced on that basis. This objection does raise an issue of construction, and our review is plenary. See *Riviere*, 924 F.2d at 1304.

Cusumano relies on various statements of the Sentencing Commission in the Guidelines. First, he points to an introductory policy statement in which the Commission described its approach to the question "whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense sentencing')." U.S.S.G. Ch. 1, part A, 4(a) (discussed in *United States v. Kitamura*, 918 F.2d 1084, 1099 & n.14 (3d Cir. 1990)). The Commission goes on to state that the process through which it created the Guidelines resulted in a compromise, one that was "close to a charge offense system" but that "contain[s] a significant number of real offense elements." *Id.* In contrast to Cusumano's contention, this discussion does not evidence the Commission's intent to adhere to a "real offense" system. Therefore, the district court was correct to apply the plain language of the specific Guidelines.

Cusumano also points to Guidelines § 1B1.2, a general application principle describing how a district court is to determine the applicable guidelines. That guideline directs the court to

"[d]etermine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)." Cusumano points to the words "most applicable" to support his view of the Guidelines.

Guidelines § 1B1.1 is of no help to Cusumano, however. That provision instructs a district court how to proceed in imposing a sentence. The first step, which is what is described in § 1B1.2, is to "[d]etermine the applicable offense guidelines section from Chapter Two." See U.S.S.G. § 1B1.1(a). That is only the first step, however, in a complex procedure. For example, § 1B1.1(d) instructs the court, in the case of multiple counts, to determine the applicable offense guidelines section for each of the counts, and then to group the counts according to Part D of Chapter III, just as occurred in this case. Cusumano's reliance on a portion of the language of § 1B1.2 is therefore simplistic, and we reject it as without merit.

We find no error in the district court's determination of the base offense level.

2. Aggravating Role

Second, Cusumano argues that the district court erred in making an upward adjustment of two levels on the basis of his "aggravating role" under Guidelines § 3B1.1. Because the adjustment is based on the district court's factual determination, our review is defined by the clearly erroneous standard. See *Ortiz*, 878 F.2d at 127.

Guidelines § 3B1.1(c) directs a district court to increase the offense level by two levels "[i]f the defendant was an organizer, leader, manager, or

supervisor in any criminal activity other than [one involving five or more participants]."⁸ The district court in this case determined that "the defendant's posture here was not one of a mere suggestor of commission of the offense, but indeed consisted of his recruitment of accomplices, his participation in planning, organizing the offense." On that basis, the district court adjusted the offense level upward.

Cusumano relies on evidence indicating that Fincke and Bogan exercised decision-making authority over the scheme and participated and profited to a greater extent than did he. Again, even assuming that the evidence suggests that Fincke and Bogan played aggravating roles, that does not help Cusumano. He seems to suggest that because others were leaders, he cannot be. This position was clearly rejected by the Sentencing Commission. See U.S.S.G. § 3B1.1, comment. (n.3). Further, Cusumano did far more than to merely suggest the commission of the offenses. See *id.*

The evidence supports the district court's conclusions that Cusumano played a more central

8. The factors involved in a court's determination under this section include the following: (1) the exercise of decision-making authority; (2) the nature of participation in the commission of the offense; (3) the recruitment of accomplices; (4) the claimed right to a larger share of the fruits of the crime; (5) the degree of participation in planning and organizing the offense; (6) the nature and scope of the illegal activity; and (7) the degree of control and authority exercised over others. See U.S.S.G. § 3B1.1, application note 3; *United States v. Gonzalez*, 918 F.2d 1129, 1138 n.9 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1015 (1991).

role. For example, it was Cusumano who first approached both Fincke and Bogan to suggest the scheme. It was Cusumano who demanded that Fincke obtain a twenty percent commission rate to increase their return, and who told Bogan that if the Board accepted the proposal Bogan would "be taken care of." Further, Cusumano participated in organizing all aspects of the scheme, including the financial transactions. The district court's conclusion that Cusumano played an aggravating role is not clearly erroneous, and thus the district court did not err in making the upward adjustment. *See Gonzalez*, 918 F.2d at 1139.

3. Obstruction of Justice

Finally, Cusumano contends that the district court improperly adjusted his offense level upward under Guidelines § 3C1.1 relating to "Obstructing or Impeding the Administration of Justice" based on his statements to the probation officer concerning his financial circumstances.

Guidelines § 3C1.1 provides for a two-level upward adjustment where "the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation, prosecution, or sentencing of the" offense. Application note 3(h) specifically states that the furnishing of "materially false information to a probation officer in respect to a presentence or other investigation" is grounds for an adjustment.

The district court found that Cusumano told the probation officer, upon questioning as to his financial resources, that stock which he owned was "essentially worthless." In fact, the court found that "[t]here was a very vigorous, ongoing,

well-nigh concluded negotiation to sell the aforesaid for over a half million dollars, which of course, is not well-nigh worthless." The district court concluded that Cusumano's statement to the probation officer was "at the very best a half truth," and that he had engaged in "willful misleading of the Probation authorities." On that basis the court adjusted Cusumano's offense level upward pursuant to § 3C1.1. We read the district court to have implicitly concluded that the false information provided by Cusumano was "material."

Cusumano disputes that the information he provided was false. He asserts that the evidence shows that at the time of his statements to the probation officer the negotiations involving the sale of Cusumano's stock were preliminary. Our review of the district court's finding that Cusumano lied and willfully mislead the probation officer is governed by the clearly erroneous standard. See *United States v. McDowell*, 888 F.2d 285, 292 (3d Cir. 1989).

We do not disagree that the sale of Cusumano's property might not have been completed at the time of his interview by the probation officer. However, that does not make the district court's conclusion clearly erroneous. Cusumano's report that his property was "essentially worthless" is entirely inconsistent with the fact that he was negotiating the sale of that property, even apart from the actual magnitude of the value of the sale. The sale need not have been consummated to give the property value. Therefore, the district court's finding that Cusumano lied about his financial resources was not clearly erroneous.

Cusumano also states that, even if his report were "less than totally candid, it did not constitute

a 'material falsehood.'" While he does not elaborate, we take Cusumano to be arguing that his misrepresentation was not "material" because it did not influence the probation officer's report.

We have found no case that has directly held on the question whether materiality under § 3C1.1 is an issue of law or fact for the district court. To the extent courts have spoken to the issue, it appears that there may be some difference of opinion. Compare, e.g., *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1389-90 (9th Cir. 1991) (review district court's finding of obstruction of justice, for false testimony as to material fact, for clear error) with *United States v. Bakhtiari*, 913 F.2d 1053, 1063 (2d Cir. 1990) (district court determination of obstruction of justice reviewed as factual finding except where question turns on interpretation of guideline term), *cert. denied*, 111 S. Ct. 1319 (1991). The parties have not addressed the specific question of our standard of review of a materiality determination by the district court. We will assume without deciding that our standard of review is plenary, because even under this more rigorous standard the district court did not err.

As the term is defined in application note 5, "material" information means "information that, if believed, would tend to influence or affect the issue under determination." Under the Guidelines, a determination of one's ability to pay is a necessary step in the imposition of a fine. See U.S.S.G. § 5E1.2. A statement to a probation officer concerning one's financial resources will obviously affect the officer's determination of ability to pay. Therefore, that information is "material" to the officer's recommendations as to fines. We thus conclude that the misrepresentation

was "material" within the meaning of application note 3(h), and that an upward adjustment under § 3C1.1 was warranted.

III. CONCLUSION

The sentence of the district court will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA CRIMINAL ACTION

vs.

JOSEPH CUSUMANO

NO. 90-00091-01

Philadelphia, Pennsylvania

December 5, 1990

BEFORE: THE HON. ROBERT S. GAWTHROP, III, J

S E N T E N C I N G

APPEARANCES:

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**Proceedings reported by stenography, transcript produced by
Computer Aided Transcription (CAT)**

THE COURT: Very well, sir. Won't you come forward please. It is my less than pleasant task to impose sentence upon you, sir. In so doing, I must note at the outset, I have received and read an outpouring of letters such that I think in

perhaps nearly 13 years on the bench I have never had anything approaching in the past and thousands of sentencings. This one certainly stands out as one in which the chorus of concern for you and your family and affection and respect has inundated the Court. I say that not critically or complainingly, but as a compliment to you, sir. It has a certain compelling eloquence.

I, of course, am bound by the statutory guidelines, and Judges in this jurisdiction are more fettered in their approaches to sentencing than they were and to a slight extent than we were in the past when I was in the Commonwealth system, where although there are guidelines, they are much less ironclad, steel-clad than those which govern that which I do here.

I have first of all considered the exceedingly able arguments of your exceedingly able lawyer, and I am mindful of the Kukumura case, and of its general philosophy, and of the general legal approach which sounds to me to make sense as well as justice, that one should not be, if one were sentencing simply a puppy dog, one doesn't sentence the wagging tail but sentences the body of the dog itself. I would not wish to have visited upon you, sir, a wagging dog tail of a sentence which is something ancillary to the gist, body of the criminal scheme of which this jury we had here saw fit to find you guilty.

And I have considered that. I would not want these guidelines to be skewed in such a way as to visit upon you some unequal justice, and some inappropriately harsh sentence for something that was a mere make-weight in the Government's assemblage of charges which it brought against you, on which the jury saw fit to convict.

But I must say the money laundering in my view is not just a sort of by-the-way addendum to the situation, but it is very much in the thick of this entire scheme, and I cannot say at all, nor could the jury, that it was something with which you had no part. The contrary is the case. And I note as well that money laundering to a lay person may seem to be just sort of an ornament on the tree, if you will, not really the essence of an offense.

As I understand the reality of criminality, money laundering in and of itself is a substantive offense of great import, and in our society today and Congress has pronounced itself quite fully on that, and I am commanded to obey the statutory dictates of our Congress. I thus am constrained to conclude that the base offense of 23 is appropriate.

As for the question of whether 3B1.1(c) applies here, that being the aggravating role base on the defendant's role in the offense, increased the offense level as follows: If the defendant was an organizer, leader, manager or supervisor in any criminal activity other than described in (a) or (b), increase by two levels.

Your counsel ably points out that the application note number three says in distinguishing a leadership organizational role from one of more management or supervision title, such as kingpin or boss, that doesn't apply here. Factors that the Court should consider include the exercise of decision-making authority, the nature of the participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

There can, of course, be more than one person who qualifies as leader, organizer of an organization or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

I think the adverb there is key, must not be ignored, certainly. And if that were the case I would latch onto that last sentence in a jiffy, but I think the evidence is considerable and evidence which the jury bought beyond a reasonable doubt that the defendant's posture here was not one of a mere suggestor of commission of the offense, but indeed consisted of his recruitment of accomplices, his participation in planning, organizing the offense.

It strikes me in many ways he was the mucilage that kept the whole criminal conspiracy together.

I thus don't see how I can avoid finding an aggravating

role here, if I find that the facts prove there to be that this defendant falls within 3B1.1(c), he does so squarely.

As to 3C1.1, which provides as to obstructing or impeding the administration of justice, if the defendant willfully obstructed, impeded, attempted to obstruct or impede the administration of justice, during the investigation, prosecution or sentencing of the instant offense, increase the offense level by two levels.

And it provides in the application note 3H, the following is a non-exhaustive list of examples of the type of conduct to which this enhancement applies: Providing materially false information to the Probation Office in respect to the presentence or other investigation for the Court.

I well recognize that deals can be but a pie in the sky, they can be on a very reversible threshold, a done deal isn't done till it's done.

But, at the same time when I read the language in the presentence report, quote: At the time—this is from paragraph 72—"At the time of the statement Joseph Cusumano informed the company stock was doing quite well. However, today it's essentially worthless," I have not only great difficulty, but I find it impossible to reconcile that with the trial.

There was a very vigorous, ongoing, well-nigh concluded negotiation to sell the aforesaid for over a half million dollars, which of course, is not well-nigh worthless.

I from time to time get myself one of these daily calendars which has a quote a day, which I sometimes find instructive. Just recently there was one that I saved, November 8, 1990, where they quote not an individual, but a Yiddish proverb: "A half truth is a whole lie," which struck me when I read it. It struck me again when I heard this morning, and to put it charitably, the utterance of Mr. Cusumano to the effect that, of that set forth in paragraph 72 is at very best a half truth.

I recognize the somewhat draconian impact of these factual findings. I would not for one minute reach out a millimeter to extend and enhance these numbers if I didn't feel impelled under my oath to make certain factual findings, but I

simply cannot turn my gaze from that which happened here as to the, in my view, willful misleading of the Probation authorities. It is not just some textual aside, but it is a very real at best half truth that was propounded to the authorities, and I conclude, find as a fact, that section 3C1.1 must apply.

I am frank to tell you that puts me in an ineluctable factfinding process, puts me in a temporal framework which is beyond what I was contemplating imposing, but I have to go with the evidence, and the law. It is the way these guidelines work.

I am always mindful from my halcyon days in my former job, of the *in pari materia* guidelines of the sentencing code of the Commonwealth of Pennsylvania which has much wisdom, and much of their language is in our guidelines, but I am well aware of the pain and hardship which is visited upon the dependents of one who is being sentenced, sentenced to a term of total confinement, and it is not a happy circumstance for anybody in this courtroom. But we have to go where the evidence leads no matter where it happens to end up.

I have given this case a lot of thought. Now is the time to impose sentence. I must stay within the mandatory framework as I see it, as it computes.

But I am going to err on the lower side of that, particularly because of the wonderful things that have been said about this gentleman, from his friends and colleagues, his acquaintances, professional and personal.

On Counts 2 through 29 of the indictment, the sentence of the Court is that the defendant will be placed within the custody of the Attorney General, incarcerated for a period of three years on each count, each count to run concurrently with each other count. That is to say the nonguidelines counts.

On Counts 37 and 38, the sentence of the Court is that the defendant will be incarcerated in the custody of the Attorney General for a period of six years on each count to concurrently with each other and to run concurrently with the sentences imposed on Counts 2 through 29, the nonguidelines counts.

The Counts 1, 30 through 36 and 39 through 49 are 71 months to run concurrently with the sentence imposed on the Counts 2 through 29, and 37 and 38.

The defendant will be placed on supervised release for a period of three years on Counts 30 through 36 and 39 through 49 only, the conditions of which are the defendant shall not commit any crime, Federal, State or local; the defendant shall abide by the standard conditions of supervised release as adopted by the Courts in the Eastern District of Pennsylvania; the defendant shall pay restitution in the amount of \$447,518.07.

I have calculated that by taking the total loss to the victim of \$597,892, reducing it by the amount paid by Dennison Fincke, that being \$150,373.93.

Should the Government attempt to recover the 111 thousand dollars from Mr. Fincke which he diverted to Greece, certainly that restitution shall be, must be abated accordingly.

A further condition is that the defendant shall supply complete and accurate financial information upon request of the Probation Office. I am going to—what are the costs of incarceration here?

MR. GOLDMAN: It is calculated by Probation I believe, Your Honor.

THE COURT: I am going to impose a fine in the amount of one dollar together with the costs of incarceration, whatever that may be. I will entertain further argument on that should it appear that that is unjustly severe, and impossibly severe. I impose the inevitable special assessment mandated in the amount of fifty dollars on each count, which comes to total of \$2,450.

Is there anything further?

MR. RUTTER: There is not with respect to the clarification of the sentence, however, I do intend to file, which will come as no surprise, notice of appeal which I expect to file even now as I leave the Courthouse. I will ask pursuant to Title 18 section 3143 that this Court permit Mr. Cusumano to remain on the bond pending completion of the appeal process.

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 90-1931

UNITED STATES OF AMERICA

vs.

JOSEPH CUSUMANO, *Appellant*

(D.C. Crim. No. 90-00091-01)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HUTCHINSON, COWEN and SEITZ, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel May 14, 1991.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 5, 1990, be, and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS

Clerk

August 28, 1991

Certified as a true copy and issued
in lieu of a formal mandate on
September 19, 1991

Test: /s/ SALLY MRVOS

Clerk, United States Court of Appeals
for the Third Circuit.